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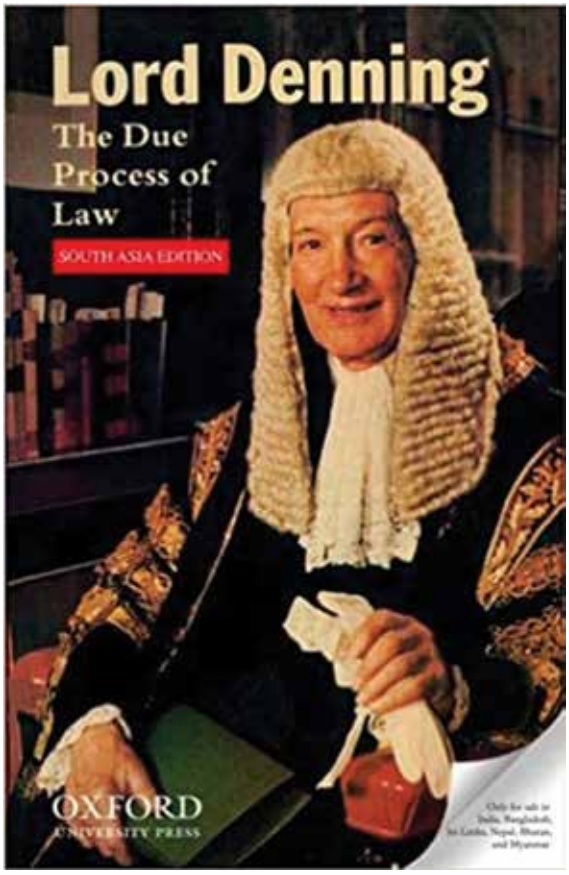
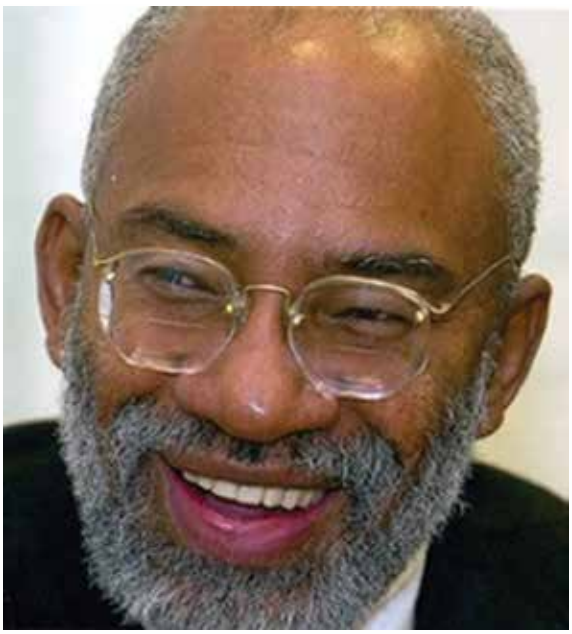


A Tribute to the late justice Lord Denning

Prof. Paul Craig on UK Administrative Law

Canadian Lawyer Michael Osborne on Competition Law



Prof. Roy L Brooks on Judicial Legitimacy

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EDITORIAL

The American Government is now facing greater challenges than it had ever imagined. The framers of the constitution could not possibly have imagined the invention of hypersonic missiles and the destructive power of the nuclear fission. It is because two centuries of innovation and development are beyond the comprehension of any living generation. Can someone predict the future after 200 years from now? The American constitution cannot address the magnitude of the challenges America is confronting today. Could there be 'a standby constitution' a mechanism that can be adopted if the President of the United States is cut off from the people. This will have a far reaching impact on the U.S allies; they too should be assured of the constitutional order in the U.S. The law makers must make a serious effort to introduce 'a standby arrangement' to ensure that constitutional order is never broken. The American society is heavily reliant on technology and it is indispensable to run the government and to make contacts with the allies. The communication facilities are a prime target of the archenemies of the United States. Mr. President we urge you to appoint a Special Presidential Commission immediately to look into the efficacy of the American constitution.

We are pleased to have had an opportunity to interview Prof. Paul Craig an established name in Administrative Law and his text book on *Administrative Law* is one of the most cited and highly regarded in this field. He has articulated on many core issues of Administrative Law. A must reading for anyone interested in the subject.

posits that the process is 'unfair and undemocratic' hence it contradicts the values in today's society. He says people of color, women and LGBTQ community did not have a seat at the table of 250 years ago and they do not have a place to call the shots today. He believes that deep rooted defects had been built into the system *ab initio*. We firmly believe that a serious dialogue on the review of the American constitution must now be given pre-eminence.

We spoke to Prof. Roy Brooks, Professor of Law at the University of San Diego School of Law on his latest book *Diversity Judgments Democratizing Judicial Legitimacy* published by the Cambridge University Press. He has challenged the judicial process of the United States. He has critiqued the process and

We feature a legend in English law, the late justice Lord Denning who died at the age of 100 on 05th March 1999. Lord Denning was a fearless judge who rather upheld the justice not the law. He was a Judge with a radical and a revolutionary mind. The brand of justice that he dispensed was what the right minded people would consider fair. The jurisprudence of Lord Denning must be documented; a special corpus must be built. This is long overdue. His contribution to administrative law is huge. He articulated the concept of *locus standi* as it enables the citizen to challenge the abuse of power by the authorities. We reproduce here an interview with late justice Lord Denning carried by the UK's The Spectator Magazine on 18th August 1990.

Michael Osborne a leading Canadian Competition Lawyer has provided his perspective on the competition law of Canada. He is an expert on this field and has had the opportunity of defending leading companies in Canada. Canadian legal practitioners would immensely benefit from his perspective.

We hope we have done justice to the Anglo-American legal tradition by featuring great jurists from across the Atlantic divide.

We welcome any suggestions and comments by the Anglo-American scholars and legal practitioners.

Srinath Fernando, LLM UK
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The Anglo-American LAWYER

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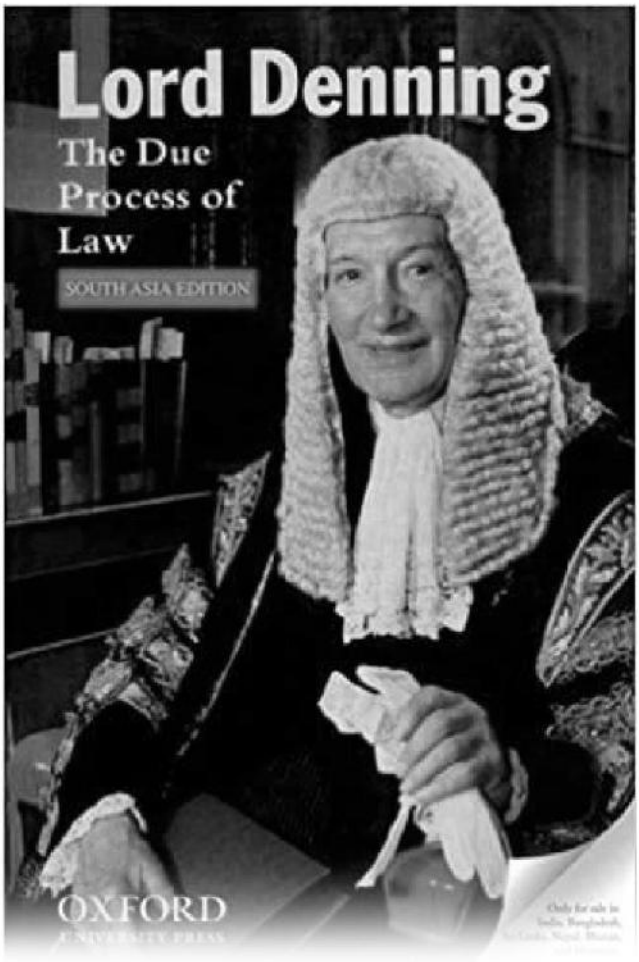


A Tribute to the late justice Lord Denning

Reproduction of the original interview Mr. A.N.Wilson of The SPECTATOR of UK, had with Lord Denning.

The after-eighties: A.N. Wilson talks to Lord Denning about doubtful verdicts and English sovereignty

THE visitor to Whitchurch, a small market town in Hampshire, passes a tiny shop-building on whose walls a plaque commemorates the birth there, in 1899, of Alfred Thompson Denning. In the same small shop — 'C. Denning, General Drapery Stores' — were also born his brother Norman, later Vice-Admiral Sir Norman Denning, and his brother Reg, later Lieutenant-General Sir Reginald Denning.

But it is Tom Denning who is the most remarkable of this remarkable family. His persona as an Appeal Court judge and a Master of the Rolls endeared him to the public and enraged many of his pedantic fellow-lawyers. Turning into The Lawn, the large house where he has resided since 1963, I meditated on the Denning Phenomenon. He belongs to the first world war generation. Two of his brothers, Jack and Gordon, died in that war, and when he returned from the trenches Tom took to heart the Lloyd George cliché of wanting to make England a land fit for heroes to live in. He was destined to become the most revolutionary and brilliant English lawyer of the 20th century. When he was ennobled, he chose as his heraldic motto, *Fiat justitia*.

His guiding principle has always been that if the law is unjust, it should be changed. But as a judge he was not afraid to set aside the letter of the law altogether if he felt that ordinary people were ill- served by it: and this led inevitably to his fellow-judges labelling him a maverick and a heretic. Perhaps his greatest single achievement was in the area of married women's equity. Until Denning, if a man deserted his wife, she had no claim on the matrimonial home, and the law insisted that, since the house was the man's property, the woman should be evicted from it. The strength of Denning's arguments against this were based on a two-fold line of attack. On the one hand, he had an encyclopedic knowledge of case law,

and maintained that the iniquitous Married Women's Property Act of 1882 could be twisted to 'do what was fair'. But secondly and much more importantly, he had a sense of what was fair. Since it was obviously unjust for deserted wives to receive no part of their husbands' proper- ty, Denning refused to rule against such women. The law was eventually changed, and brought into line with justice.

I met him in his library, this legend. Brown, very bright eyes, soft skin, the most enchanting smile, and the famous Hampshire voice, which some say has been maintained over the years for reasons of affectation. I do not believe so. It was immediately apparent that affectation forms no part of his nature. He has the true simplicity which nearly always accompanies genius. He is old now, and deaf, but he is not ga-ga, and the old Denning magic is still very much alive.

Wilson: Could I begin by asking you about your family? There is something very remarkable about a small draper in Whitchurch having sired an admiral, a general and a Master of the Rolls.

Lord Denning: It is remarkable. My mother was certainly very intelligent and capable — less gentle than my father. His family were very poor. They were brought up in Leckhampton, near Cheltenham. They used to go to the shop and ask for a pennyworth of rice pudding.I remembered that Lord Denning had chosen rice pudding as his luxury item when he was the castaway on Desert Island Discs.

Wilson: Did you feel out of things when you went up to Oxford?

Lord Denning: Yes. Magdalen was very much a college for the Etonians, you see, and I was awfully shy at having been to a grammar school; and when they asked me, 'What school were you at?' I used to fence with the question. I don't know if I was ashamed, but I knew they looked down on anyone who was from a grammar school or anything like that.

Wilson: Did you have a good tutor?

Lord Denning: No. He was the most ignorant man I ever met. A barrister on the Northern Circuit.

Wilson: So you taught yourself?

Lord Denning: Yes.

Wilson: Was it when you were an undergraduate that you began to sense a discrepancy between the letter of the law and what might be termed natural justice?

Lord Denning: Yes. That didn't come out of books, or anything like that. Only my feeling. For instance, when I was at Oxford studying text-books, I'd write a little note in the margin, 'That's not right.' It's an inbuilt feeling of what justice should be. Wilson: Where do you suppose such feelings come from? We've changed our ideas of morality very much over the centuries. Lord Denning: Certainly, Victorian morality is very different from our present lack of it. Wilson: Is that something you deplore? Lord Denning: I think one of the most deplorable things today is that the institution of marriage is going down. No end of people

live together without being married. No end of one-parent families. They're never called bastards or illegitimate — those are words which are not allowed to be used, if you please.

Wilson: But, how would you. . . .

Lord Denning: And then again, you aren't allowed to talk about buggers. You must talk about homosexuality. In other words, all the words in the language which we used to condemn immorality of any description have been taken out. No bastards, no buggers.

Wilson: Do you regret the change in laws relating to homosexuality? ●

Lord Denning: Oh, I don't mind 'em not being in prison, but I hate it being put on a par with other things. And lesbianism. . . . Oh no! I'm still against it.

Wilson: I remember that in your Dimbleby lecture, you quoted Juvenal — *Quis custodiet ipsos custodes?* . . .

Lord Denning: Yes. Who's going to guard the guardians? Who's going to guard the judges?

Wilson: Are you in favour of judges being called to account?

Lord Denning: (Long pause. Laugh). That's a very nice question. They must be independent of the executive. Then, who is to call them to account? I would stress their independence.

Wilson: And what about a case such as that of the Guildford Four, where these men who did not commit the crimes. .

Lord Denning: Ah!

Wilson: . . . are locked up for 15 years. Denning: Pause a moment. It's not true. It's not been proved against them with the strictness which English law requires. Wilson: Lord Denning, it has been established beyond question that the Guildford Four were not guilty of crimes for which they were imprisoned for many years.

Lord Denning: That troubles me a lot, because I knew very well Sir Norman Skelhorn, the Director of Public Prosecutions at the time, a first-rate man. He's dead. He's unable to explain what happened, and it was his responsibility.

Wilson: What about Lord Donaldson? Do you think he was wrong not to appear before the May inquiry [into the conduct of the Guildford case, in which Donaldson was the original judge]?

Lord Denning: Did they invite him to?

Wilson: So I understand.

Lord Denning: I had wondered why his name was not on the list of witnesses. I think he was probably wrong to do that. Oh, yes. John Donaldson ought to have gone before the inquiry. In a way, by not doing so, the criticism is left unanswered.

Wilson: Exactly. And your great fear, isn't it, is that public confidence in the judiciary and the entire legal system is breaking down?

Lord Denning: That's why I dislike television. I think they have a series called Rough Justice. Finding out cases of

injustices, as they call them, thinking they're doing a lot of good.

Wilson: But if fresh evidence comes to light because of their investigations . . .

Lord Denning: Fresh evidence is admissible and is brought before the Court of Appeal, you see.

Wilson: Surely strong public confidence in the judiciary would depend on having very good judges, which we seldom seem to do.

Lord Denning: That's right. And on their being called to account when they go wrong. We haven't any system of calling them to account except by way of appeal.

Wilson: And is it advisable to allow anybody to serve on a jury?

Lord Denning: That's one of the other draw- backs of recent times. In my young days, juries were all middle-aged, middle-class, middle-minded, to use Devlin's phrase. The present system of random juries may lead to random justice. Look how bad it is for these fraud cases, the Guinness trial, all that sort of thing. The jury aren't bright people, they aren't versed in accounts. Wilson: Are you saying that the jury system is in fact inimical to justice?

Lord Denning: No. I've still got a firm belief in trial by jury, but I'd have them selected differently. I'd have a panel of suitable jurors. I'd let names be nominated if you please by trade unions and the like, by big employers, by the banks. In other words, I'd have a list of respectable, responsible citizens. I wouldn't have every Tom, Dick, or Harry as they do now.

Wilson: But do you still believe in trial by jury?

Lord Denning: Oh, yes. Trial by jury is one of the rights of Englishmen.

Wilson: You mention the trade unions. You have on occasion been accused of bias against the unions.

Lord Denning: That's quite wrong. You've got to remember the Dock Strike in 1972. Lord Donaldson, who was the President of the Industrial Court, was sending the Dockers to prison and an appeal came before me. We released those dockers, and it eventually led to the reform of the law and the Industrial Relations Act of 1971. I remember one day Geoffrey Howe, who piloted that Act through the Commons, coming up to me privately and saying I'd ruined the country for the rest of the century. Because our decision torpedoed his Act.

Wilson: Was Geoffrey Howe a very competent barrister?

Lord Denning: I didn't think so. Had him before me quite often. He's really at heart a politician. Same as Hailsham, getting his advancement up the legal channel.

Wilson: Is Hailsham a great lawyer?

Lord Denning: Oh, no. I've always known him at heart to be a politician.

Wilson: Do you like him?

Lord Denning: Oh, yes, oh yes. I don't think he quite likes me. I'm not quite sure why that is. I can feel an undercurrent of envy, jealousy, whatever you like to call it. I

decided it would be best to move away from such personal matters.

Wilson: Isn't it a terrible indictment of the legal system that barristers charge such high fees that people can't any longer afford to defend their interests in law? **Lord Denning:** Yes. I've had a case recently, two people against the two archbishops . . . . Wilson: You issued a writ against the Archbishop of Canterbury because of his decision to ordain divorced men to the priesthood?

Lord Denning: There's this very nice couple and she's a member of the General Synod of the Church of England. They hadn't got any money. They were against this mea- sure. I took the view, and I think they were right, it couldn't be passed except by a two-thirds majority. It was passed by less. The Archbishop ruled it was all right. Well, I drafted the writ for this couple, and a statement of claim.

Wilson: What was the fate of that writ?

Lord Denning: It went before the judge, Mr Justice Hoffman. He's quite a good judge but he was completely wrong about it. He torpedoed their case in half an hour and I've told them to appeal, and they are appealing. The threat against them, and this is what annoys me, is the threat of costs. They have said they won't charge the archbishops any costs if they win the case. The archbishops reply, 'Oh, ho! If we win, we're going to charge you all our costs and employ the most expensive counsel.' Using the threat of costs. I see it every day, the threat of costs being used by the big man against the little man.

Wilson: Do you think that was a very Christian act on the part of the Archbishop?

Lord Denning: Certainly not.

Wilson: On the other hand, is it Christian to be a judge? 'Judge not that ye be not judged'?

Lord Denning: I'm often asked that with regard to the death penalty. I'm about the only judge left who ever passed the death sentence.

Wilson: Who did you pass it on?

Lord Denning: Oh, several people.

Wilson: It must have felt terrible when the black cap was put on your head.

Lord Denning: Not really.

Wilson: You had no feeling at all about this? Denning: Oh, no. There could always be a reprieve if it was a proper case.

Wilson: Nevertheless, were you glad to see the death penalty abolished?

Lord Denning: Not really. It ought to be retained for murder most foul. We shouldn't have all these campaigns to get the Birmingham Six released if they'd been hanged. They'd have been forgotten, and the whole community would be satisfied.

Wilson: But would justice have been satisfied if the wrong men had been hanged?

Lord Denning: (chuckles) No. There is always that danger.

Wilson: If they had hanged the Guildford Four they would have hanged the wrong men, wouldn't they?

Lord Denning: No. They'd probably have hanged the right men. Not proved against them, that's all.

Some days after our interview Lord Denning got in touch with me expressing some concern about what I would make of his remarks concerning the Guildford and Birmingham cases. I sent him the relevant pages of the transcript and he said he was happy for them to be published.

In the week I saw him, the Bruges Group published an attack by Lord Denning on the threat to the British legal system by the encroachment of pan- European law.

Wilson: What are your thoughts about the European Courts of Justice and the exercise of power in this country by the European Parliament?

Lord Denning: That's very important. Our Eng- lish Parliament says that Spaniards fish in our waters by quota. The Europeans say that's illegal by their law. It's no longer English waters, if you please . . . [At this point his voice had become like some strange old folk-song, slow and music- al] . . . It's European waters. All can come into your European waters. [Then, a sud- den change of tone. He slammed the desk-top and began to speak rapidly] They've got to reverse an Act of Parliament to do that and I say they have no right whatsoever to do it. They were never given the right by treaty to overrule our sovereignty. That's only done by the courts themselves who are manned by pan- Europeans. Their decisions are all influenced by their ideology.

Wilson: There are, of course, English Eurocrats, Englishmen who play a part in the European Denning: Leon Brittan. He wasn't much good. He appeared before me several times when he was at the bar, in libel cases. He was no good. Now, he's whatever it is in Europe. A German Jew, isn't he? [In fact Sir Leon Brittan's parents were from Lithuania and their children were born in London.] **Wilson**: What's that got to do with it? **Lord Denning**: Look him up. I think you'll find he's a German Jew, telling us what to do with our English law. It's quite plain that these pan-Europeans do not go by the words of the treaty. That's why I don't think there's much chance of altering things. I'd rather go with John of Gaunt — England,

This land of such dear souls, this dear, dear land, Dear for her reputation through the world, Is now leased out, I die pronouncing it, Like to a tenement or pelting farm.

That's what I feel like now. I'm getting old. That's what we are, a tenement of Europe. I die pronouncing it.

Wilson: Can we do nothing to stop this? **Lord Denning**: Only if they would listen to me.

Prof. Paul Craig on UK Administrative Law

Paul Craig was educated at Worcester College, Oxford, where he subsequently became a Fellow and Tutor in law in 1976. He was appointed to a Readership in 1990, and then became an ad hominem Professor in 1996. He was appointed to an established chair in 1998, the Professorship in English law, which is held at St John's College Oxford. He was made an Honorary QC in 2000, and an Honorary Bencher of Gray's Inn in the same year. He has lectured at many other institutions across the world, including in North America, Europe, China and Australia. He is editor of the Clarendon Law series, co-editor of a monograph series on EU law in Context, and is on the editorial board of various law journals. He is also a delegate of Oxford University Press, and the alternate UK member on the Venice Commission for Law and Democracy. His research interests include Constitutional Law, Administrative Law, Comparative Public Law and EU Law, and he has published widely in these areas. Source; https://www.thebritishacademy.ac.uk/fellows/paul-craig-FBA/

The AAL Magazine: Why is Administrative Law Paramount in Governing a Country?

Prof. Craig: Administrative law exists because regulation exists. Parliaments in every country regulate a very great many things, ranging from social welfare to the environment, from banking to securities regulation, and from planning to education. Parliament will commonly do so through grant of duties and powers to ministers, agencies and the like. Administrative law is paramount in governing a country because it is there to ensure that the duties and powers given to the administration, broadly conceived, are fulfilled, that the grantee of the duty or power remains within the limits accorded by the enabling legislation and that certain key principles of good administration, such as natural justice, are observed, when the power is exercised. Thus was it ever so. Administrative law developed in the UK from the mid-16th century onwards, with earlier origins. The development was directly linked to the growth of regulatory legislation by the Tudors and Stuarts, which then generated the case law that laid the foundations of UK Administrative law.

The AAL Magazine: Has there ever been a suggestion that over regulation of the public conduct is a hindrance to human progress?

Prof. Craig: It is not uncommon for governments to complain that judicial review imposes burdensome constraints on fulfilment of government functions. There is, however, no warrant for any claim that the kind of regulation of government conduct that occurs through administrative law constitutes any hindrance to human progress. Nor is there much foundation for the assertion that judicial review is unduly burdensome on government. It is perforce true that if administrative law did not exist then governments would not be troubled by judicial review. Such review is, however, as noted in answer to the first question, necessary, inter alia, to ensure that the executive remains within the remit of the power given by Parliament, and that when exercising such power/duty it complies with basic principles of good administration. The courts are, moreover, acutely aware of the need to ensure that administrative law does not unduly hamper the discharge of government business, and this is evident in a number of different administrative law doctrines.

The AAL Magazine: What would be your prognosis on the net result of UK having got itself divorced from EU. What impact does this have on the EU jurisprudence in UK?

Prof. Craig: These are big questions. In purely legal terms, the UK is no longer bound by EU law, in the sense that new EU regulations, decisions and directives no longer bind the UK, nor does new case law from the CJEU. There are, however, exceptions and qualifications to these basic propositions derived the UK Brexit legislation, from the UK-EU Withdrawal Agreement and from the UK-EU Trade and Cooperation Agreement. Paradoxical though it may seem, the UK's exit from the EU went hand in hand with bringing the entire EU acquis communautaire into UK law. The paradox is, however, readily explicable. The UK had been part of the EU for nearly 50 years, with the consequence that many matters were regulated by the EU. There would commonly not be autonomous UK law in many of these areas. It was, therefore, necessary to bring the entirety of EU law into UK law in order to prevent the existence of regulatory black holes in the UK statute book. The idea was that the UK would then engage in a two-stage process. It would render the EU thus domesticated fit for purpose by the time that we exited the UK; the UK Parliament could then decide at its leisure thereafter whether it wished to retain, amend or repeal the EU legislation. This, however, led to complex domestic statutes dealing with issues concerning the status of retained law in the UK, and the extent to which UK courts could consider CJEU case law in the future. The UK courts will continue to grapple with these issues for a number of years to come.

The AAL Magazine: Prof. Craig, Rule of Law is the fundamental doctrine by which every individual and every government authority must obey and submit to the law. In essence what it means in principal is that everyone is equal before the law and all must obey the law. UK does not have a written constitution however the rule of law, and the Parliamentary Sovereignty and court rulings are fundamentally the bedrock principles of the unwritten constitution. Could you please explain as to how this delicate balance is maintained in the UK?

Prof. Craig: This is another very large question. Given the exigencies of space, the answer is as follows. There are, as is well known, different conceptions of the rule of law. At its most basic it captures the idea of rule by law, in the sense that it is incumbent on those in power to point to a basis that is regarded as valid by that legal order if it wishes to enact legislation, or exercise any other form of authority. There is then a broader idea of the rule law, espoused most notably in the modern day by Professor Raz, which regards the rule of law as essential for guiding human conduct, from which he then deduced a number of more specific attributes of the rule of law, such as that it should be prospective, not retrospective and that there should be an independent judiciary. Both of these models of the rule of law are formal, in the sense that they do not turn on the substantive content of any particular law. It is therefore possible on both such models for the rule of law to be followed in an autocratic society. There are, however, more substantive conceptions of the rule of law, espoused by writers such as Professor Dworkin and Lord Bingham, which include the elements from the previous two models, but also go further and require protection for fundamental rights and principles of good administration.

These principles underpin and inform the principles of judicial review, as they have been developed by the courts over 400+ years. They also underpin and inform principles of statutory interpretation, such as the principle of legality, through which the courts interpret primary legislation so as to ensure, where possible, that it does not infringe fundamental rights. It is through such techniques that the courts advance the rule of law in the UK, against

the backdrop of parliamentary sovereignty. They have been pretty good at doing so over the years.It, nonetheless, remains the case that parliamentary sovereignty is the dominant constitutional principle in the UK, insofar as it is expressive of the idea that there are no barriers, procedural or substantive, on what the can be done by the sovereign legislature. There might be instances where what was done was such that the courts really would baulk at accepting the result, which might then precipitate a technical legal revolution. Subject to this possibility, it is open to Parliament to enact whatsoever laws it should choose to do. This includes matters such as limiting the remit of the Human Rights Act 1998, and it includes also repeal of constitutional statutes, provided that this is done expressly and unequivocally.

The AAL Magazine: There have been occasions in the UK's legislative history where the Parliament had promulgated legislation with retrospective effect. I would like to cite the War Crimes Act of 1991. Of course all those who have found to have committed horrendous war crimes in Nazi Germany must be held accountable. I am fully in agreement with the underlying legislative principle. However for our analysis, I find this retrospective legislation goes against the very principle – which I believe is postulated by Dicey – that laws must not be retrospective hence a person cannot be tried for an offence if the conduct was not an offence at the time the offence was committed. What is your take on this Prof?

Prof. Craig:I find this particular example less troubling. We go back to fundamentals. Retrospective legislation is rightly regarded as contrary to principle, since it offends the basic tenet of the rule of law, to the effect that people should be able to plan their lives secure in the knowledge of the consequences of their action. This is not possible where law is rendered applicable to facts and circumstances that took place prior to the enactment of the retrospective law. This fundamental precept is even more important where the law that is retrospective imposes criminal punishment. There are, however, two circumstances where retrospective laws are less problematic.The first relates to situations in which a law is rendered retrospective in order to remove a penalty imposed under an unjust law. This is exemplified by the retrospective removal of a penalty imposed under an apartheid law. Pretty much everyone would agree that this type of retrospective law is acceptable. The second relates to situations where the retrospective law imposes sanctions on behaviour which, although it might not have been formally illegal at the time, was nonetheless offensive to some fundamental tenet of morality, sufficient to warrant the retroactive component of the relevant legislation. There will not be many instances in which this is necessary, in large part because in most instances the relevant action will be covered by an existing legal rule. However, in rare instances where this is not so, the retroactivity can be justified.

The AAL Magazine: Professor, I can still remember we had a lecture on the Doctrine of Proportionality and I understand this is principle developed in the EU. Prof. Jeffrey Jowell, QC articulated that the proportionality test to involve a four processes namely, that the action pursued must have a legitimate aim, whether the means deployed suitable to achieve that aim, and whether the action could have been achieved by a less restrictive alternative. I find that these four thoughts are a subjective matter for the Judiciary. It could be interpreted differently by various judges according to their own way of thinking. Do you think

this principle has not been as adequately critiqued as it should have? How would you respond to this? Could this principle be further refined and built upon.

Prof. Craig: Proportionality is a general principle of EU law, and is thus used in all types of case, irrespective of whether they involve rights-based challenges to government action or whether they are ordinary administrative law cases. Proportionality thus far in the UK applies under the HRA 1998 and in the context of legitimate expectations, and it used to apply when the UK was implementing EU law, while still a Member State of the EU. There is a vibrant debate in the UK as to whether proportionality should be applicable outside the domain of the HRA 1998, such that it can be applied in ordinary public law cases. I believe that it should, although I am probably in the minority in this respect. This is certainly not the place to repeat or traverse the multiple arguments back and forth concerning this issue.

Suffice it to say for the present, that those against the further application of proportionality do not generally argue that this is because the meaning of 'necessary' or 'suitable' may be contestable, or that the terms might be interpreted differently by different judges. They are right not to base any weight on this point. This is because it is equally true for just about any precept in public law, or private law. Different judges might interpret reasonableness in public law differently, and there might be similar divergence of view as to the application of reasonableness in negligence cases.

The AAL Magazine: Professor, I would like you to refer to the very famous case in UK *R v North and East Devon Health Authority, ex party Coughlan* in which substantive legitimate expectation was the driving force behind that judicial determination. How does the policy of the authority be implemented when there are expectation that have been conveyed by a previous administration assume if the expectation itself may not have undergone proper scrutiny at the time it was made known. Eg conveying the impression that a public facility could availed for life. Would not this be a dilemma to the incumbent administration? Do you think that the doctrine of legitimate expectation must be critiqued in such a way that priorities of the government too must be given pre-eminence provided priorities are of national concern? Can the Government - for example - take over the Mardon house on the pretext of land acquisition for development purposes or for a new highway to be built over Mardon house?

Prof. Craig: The point that you make is an important one. The courts have, however, built two safeguards into the doctrine of substantive legitimate expectations. The first addresses the very point that you make. It is difficult for a claimant to prove that any such expectation has been created. The claimant will have to show that there was a specific and certain expectation and the courts will also ensure that the background facts said to generate the expectation provided a plausible basis from which to conclude that an expectation had been intended. A very great many cases fail on this ground at this juncture. The courts are therefore mindful of the risks of saying that a legitimate expectation has been created and mindful of the constraints that it might place on the public body's freedom of action. The second point to note is that the doctrine of substantive legitimate expectation allows the public body to plead overriding concerns relating to the public interest, which thereby allows the public body to resile from the expectation that it had created. It will be for the court to decide whether the public interest concerns thus pleaded warrant departure from the legitimate expectation.

The AAL Magazine: Professor, as you know that the rule of law demands that the courts retain a supervisory jurisdiction over the exercise of public power and this manifested in the doctrine of judicial review and this is primarily to guard against the abuse of power and to ensure that executive actions are within the bounds of law. But sometimes the legislature removes the public from challenging the decision of the public authorities. Do you think ouster clauses are contrary to the principal of judicial review - hence it must be done away with?

Prof. Craig: Judicial review has, as noted above, existed for a very long time in the UK. It has origins that date back to the 14th century, and really began to develop from the beginning of the 17th century. There have, over time, been repeated efforts by Parliament to exclude the courts, in the form of ouster clauses. The judicial attitude to such clauses has been pretty constant over time. They have, not surprisingly, resisted such clauses and interpreted them narrowly, for the very reasons that you note in your question. An ouster clause purports to remove the authority of the courts and hence the availability of judicial review from the particular area to which the ouster clause is applicable.

It is, however, not possible to 'do away' with such clauses in a system based on parliamentary sovereignty. The courts and commentators can try to persuade Parliament that such clauses should not be used, but the courts cannot outlaw them, since this would be to imply a limit on parliamentary sovereignty, and hence run counter to that constitutional principle.

The AAL Magazine: There have been many critiques on the decision of the *Privacy International* on ouster clauses. Has it broken a new ground on ouster clauses?

The judicial and academic contestation concerning *Privacy International* centred largely on the facts of the case in the following sense. The difference between the Court of Appeal and the Supreme Court, and the difference between the majority and minority in the SC, turned largely on whether it was necessary to interpret the ouster clause very narrowly, given the nature of the specialist legal tribunal in question.

Thus, the Court Appeal, distinguished *Anisminic* in part because s.67(8) was framed so as to exclude judicial review even in relation to decisions as to whether the IPT had jurisdiction. The Court of Appeal concluded that the case was therefore different from *Anisminic*, since the wording of s.67(8) ousted judicial review of decisions as to whether the IPT had jurisdiction. This, coupled with the fact that the Investigatory Powers Tribunal was an independent body with considerable expertise over the subject matter, which exercised a power of judicial review over the bodies subject to its remit, led the Court of Appeal to dismiss the claim.

In the SC, Lord Sumption dissented, and Lord Reed agreed with his judgment. Lord Sumption held that the purpose of judicial review was to maintain the rule of law. However, the rule of law was sufficiently vindicated by the judicial character of the Tribunal. It did not require a right of appeal from the decisions of a judicial body of this kind. Section 67(8) was not therefore an ouster of jurisdiction that constitutional principle required the High Court to have.

The majority in the SC took a contrary view. Lord Carnwath, with whom Baroness Hale, Lord Kerr and Lord Lloyd agreed, held that there was a fundamental common law presumption that the supervisory role of the High Court over other adjudicative bodies, even those which had been established by Parliament with apparently equivalent status and

powers to those of the High Court, should only be excluded by clear and explicit words. Lord Carnwath concluded that s.67(8) applied only to a legally valid decision relating to jurisdiction. A decision that was vitiated by error of law, whether "as to jurisdiction" or otherwise, was no decision at all. Judicial review could only be excluded by "the most clear and explicit words" and s.67(8) did not suffice in this respect.

The AAL Magazine: If I may venture into 'discretionary justice' in UK, some public functionaries are given discretion to make decisions. The *Wednesbury* reasoning is the best any public functionary could take cognizance of. However Wednesbury reasoning has now a new dimension such as the doctrine of proportionality. How do you define discretionary justice and how it is to be realized?

A big question, but the essential point is as follows. It is accepted by all that there must be some control over discretionary power, in order to ensure that it is not abused, and that it is not used to attain improper purposes. It is accepted by all that the courts should not, however, substitute judgment on the merits. They should not overturn the administrative decision merely because they would have made a different decision if they had been the primary decision-maker. The UK courts do not do this and recognize that they should not do this.

Subject to the above, there is contestation as to the intensity of such review, and whether it is best done through reasonableness or proportionality, or though an admixture of the two. I would emphasize in this regard the importance of reason-giving and assessment of evidence when considering the relevant intensity of review that should pertain to different types of case.

Prof. Craig: It is not uncommon for governments to complain that judicial review imposes burdensome constraints on fulfilment of government functions. There is, however, no warrant for any claim that the kind of regulation of government conduct that occurs through administrative law constitutes any hindrance to human progress. Nor is there much foundation for the assertion that judicial review is unduly burdensome on government. It is perforce true that if administrative law did not exist then governments would not be troubled by judicial review. Such review is, however, as noted in answer to the first question, necessary, inter alia, to ensure that the executive remains within the remit of the power given by Parliament, and that when exercising such power/duty it complies with basic principles of good administration. The courts are, moreover, acutely aware of the need to ensure that administrative law does not unduly hamper the discharge of government business, and this is evident in a number of different administrative law doctrines.

Canadian Lawyer Michael Osborne on Competition Law

Michael Osborne is a partner in the Litigation and Competition & Foreign Investment Groups at Cassels. Michael advises and defends clients in inquiries and proceedings commenced by the Competition Bureau, including criminal matters, abuse of dominance, and marketing and advertising matters. He defends clients in private proceedings under the Competition Act, including price fixing class actions. Michael acts for and advises parties in a wide range of commercial disputes, including contractual disputes, shareholders' disputes, commercial fraud, and employment matters. He also offers experience in a range of regulatory and white-collar crime matters. Michael has acted as trial and appellate counsel before all levels of court across the country, the Competition Tribunal and other administrative tribunals, and arbitral tribunals in international and domestic arbitrations, both institutional and ad hoc. Michael is also an arbitrator, and a Fellow of the Chartered Institute of Arbitrators.

The AAL Magazine: Michael Osborne, thank you for the opportunity to interview you on issues concerning competition and fair trading in Canada. You are a senior legal practitioner specializing in competition law and have had the privilege of representing key companies in Canada. If I begin this interview, may I first ask a question on moral reasoning. What exactly is fair trading in a very competitive environment?

Michael Osborne: Although some attempt to imbue arguments in competition cases with a moral perspective, I would argue that modern competition law is not based on a view about what is morally right, but on an economic assumption. That assumption is that consumers, businesses, and the economy more generally, will benefit from competitive markets. That benefit is primarily material; consumers will benefit from greater product selection, greater innovation, and lower prices. Businesses and the people who work for them will benefit as well.

Competition law only makes sense in the context of a free market economic system. The assumptions underlying competition law are closely related to those underlying free markets. In an economic system based on monopolies (such as the guilds of mediaeval Europe) or state ownership of most businesses (communism, for example), competition law makes little sense. This remains true in sectors of the economy that are nationalized or are natural monopolies, for example, electric and natural gas utilities, or rail systems. In those cases, competition cannot regulate prices; instead, the government must establish a price regulator.

Competition has a destructive side: inefficient businesses will fail, and the people that work for them will lose their jobs. Thus the process of creation and destruction that competition implies creates great benefits, but also, for some, hardship.

As a result, sometimes a "moral" approach might lead one to prefer non-competitive markets. But this can have quite serious unintended effects. One good example of this is Canada's agricultural supply management system. Supply management was introduced in the 1960s and 1970s in order to protect farmers in certain sectors (principally dairy) from the vagaries of the market. The system effectively cartelizes dairy markets in Canada, ensuring that

farmers receive a price that exceeds the costs of production. While the system certainly does that, it lowers incentives to reduce costs and increases the price of milk to well above international levels. The OECD has estimated that consumers pay about $2.5 billion more for milk than they would otherwise. The system also creates massive barriers to entry for would-be dairy farmers, as they must buy quota in order to enter the market. In order to prevent quota from becoming too expensive, some provinces regulated the price of quota, with the result that very little quota is available on the market.

The AAL Magazine: Do you see the same economic underpinnings are applied in the Anglo-American world eg in the U.S, UK, Australia and other Commonwealth countries and whether this has any difference under EU jurisprudence.

Michael Osborne: There is today a broad global consensus on the importance of competition law and its main purposes. While Canadians like to brag that our first anti-cartel legislation was enacted one year before the Sherman Act in the US, the truth is that competition law was largely invented in the US, where it is called antitrust law. In recent decades, most countries around the world have adopted competition legislation. Free trade agreements now typically contain a chapter on competition law. Competition law is promoted at the international level, by the Organization for Economic Co-operation and Development and the International Competition Network (ICN). The ICN is a forum for competition authorities from around the world to discuss best practices.

Despite this broad agreement, countries do diverge. The US takes an avowedly consumer welfare approach to competition policy. Canada, but contrast, looks are broader economic factors, including efficiency. This plays out in merger control. In Canada, a merger that will lessen competition will nevertheless be permitted if it creates efficiencies that outweigh the harm to competition. Efficiencies are, in short, a complete defence. In the US, efficiencies are but a factor to be considered; they are not a defence.

One of the main divergences is between the approaches taken in North America and Europe to abuse of dominant position. Europe is much more interventionist than North America. In Europe, a dominant undertaking is considered to have a "special responsibility" towards its competitors. Effectively, large firms are expected to pull their punches to some extent when competing. This is not the case in North America, although there are signs this may be changing.

Another example is South Africa's merger control regime, which imposes a broad public interest test that looks at, among other things, the effect of the merger on employment and on businesses owned by historically disadvantaged people.

The AAL Magazine: I have not seen much citation of EU jurisprudence in Canadian competition cases. Have you ever driven your arguments based on the jurisprudence advanced in the EU competition and fair trading cases?

Michael Osborne: EU jurisprudence is rarely invoked in competition cases by the

parties, the Competition Tribunal, or the courts. By contrast, US cases are frequently cited.

The AAL Magazine: I assume the underlying legislative rationale of the Competition law in Canada is to create a competitive business environment. The purpose of the Competition Act says that it is 'to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices'. Has the Government of Canada been able to maintain this policy objective since the time the Competition Act was enacted?

Michael Osborne: The purpose clause of the *Competition Act* is frequently cited. Yet because it consists of a list of aims that are to some extent in tension, it is rarely determinative. There is considerable debate in Canada over the role of efficiency in competition law. At the moment, it provides a complete defence to an anti-competitive merger. The Competition Bureau (our competition authority) has been agitating for years to remove the efficiencies defence.

One of the assumptions underlying the Competition Act—and competition laws around the world—is that establishing "rules of the road" for businesses will lead to all of the things that we want: lower prices, more choice, and better products. When this does not happen naturally, governments are sometimes tempted to intervene to achieve the desired outcome. Those interventions are rarely successful, however. One example in Canada is the federal government's policy of trying to encourage new entrants into the mobile telephone market. The government wants a fourth national wireless carrier in order to bring down Canada's mobile prices, which are among the highest in the world. The government has set aside spectrum for new entrants, and requires incumbents to allow these new entrants to roam on incumbent networks. This policy has been a failure. While there are regional fourth carriers, none has been able to mount a serious challenge to the three incumbent national networks.

The AAL Magazine: I could not find a proper definition of what exactly competition means. The purpose of the Act is simply a policy objective only. Have you found in your practice that proper definition of competition should have been incorporated? Given the huge corpus of jurisprudence having been built up over the years, do you think it is about time the Government of Canada looked at the Competition law holistically? After all, the original act was enacted in 1986.

Michael Osborne: No, I do not think that a statutory definition of "competition" would be successful. "Competition" is notoriously difficult to define. Legislators generally have not attempted to define what it means, but have instead left it up to tribunals and courts to do so. I think that is the right approach.

Competition is not a thing but a process. Competition exists where firms actively

compete with each other for business. The *Competition Act* includes competitive effects tests for evaluating mergers and potentially anti-competitive conduct, most notably, the substantial lessening or prevention of competition test. This test is actually quite well understood. It involves comparing the level of competition with the merger or conduct in question with the level that would obtain but for the merger or conduct. One of the most important indicia of whether competition would be substantially reduced is whether prices would be lower but for the merger or conduct.

The *Competition Act* was enacted in 1986, following two decades of debate about amendments to its predecessor, the *Combines Investigation Act*. The 1986 Act has been hailed as the most economically literate in the world. It has been amended numerous times. The biggest of these changes was the new conspiracy provision, which came into force in 2010.

The Senate of Canada is currently conducting a review to determine whether the Act should be amended to better deal with the digital economy. While countries should review competition legislation from time to time to make sure it responds to the needs of the economy and that there are no gaps, competition law is meant to provide a broad, flexible framework. In other words, competition law should not need amendment every time some new issue appears. Rather, it is meant to be flexible enough to respond to new challenges.

The AAL Magazine: When it comes to a 'monopoly' a proper definition is also required. In some cases due to lack of competitive participants in the market a company could be known or described as being a monopoly or engaged in monopolistic practices unwittingly. The prejudices also might play a role in looking at a certain entity. It could be driven to be seen as a monopoly because there are no known competitors of that product. In some cases a product could be an important link in the Canadian supply chain. Do you think given such a scenario a proper definition should also be articulated? Yet another matter for law reforms I assume.

Michael Osborne: While the term "monopoly" is often used as a shorthand, the more accurate expression is "market power". Market power means the ability to behave independently of the market, for example, a firm that can raise prices without being constrained by competitors is said to have market power. In broad terms, competition law in Canada and around the world is concerned with the acquisition and abuse of market power. It does so in three ways: First, it prohibits collusion between competitors, such as price fixing and bid rigging. In Canada, the US, the UK, and many Commonwealth countries, cartels are punished as criminal offences. Second, it controls the acquisition of market power through mergers. In Canada, as in most countries, the merger control regime is permissive. That is, firms are permitted to merge unless the Competition Tribunal finds that the merger will lessen or prevent competition substantially. Third, it steps in where a firm that has market power abuses that market power to exclude, discipline, or predate against rivals. This behaviour, known as "abuse of dominant position" or "monopolization", is the most difficult to

recognize, because the line between anti-competitive conduct and aggressive competition on the merits is extremely hard to draw in practice. This makes enforcement decisions difficult. An overly interventionist approach will actually reduce competition, as it will cause large firms to compete less aggressively. But a failure to constrain anti-competitive conduct will lead to small firms being unable to enter and expand in the market.

It is also important to understand that competition law does not penalize firms for having market power, or for achieving market power in desirable ways, such as through innovation, better products, or better service. Market power is in a sense the prize that firms are competing for; they compete to produce a better product that will command a higher price and generate greater profits.

The AAL Magazine: Do you think if the consumer is denied a choice, it is a matter for the trade policy of the Government. Do you think the government should encourage new investors in that market place so that people are given more choices?

Michael Osborne: Competition law is about providing greater choices to consumers. Investments that create new businesses help increase that choice. Thus governments should encourage investment, both to grow the economy and broaden consumer choices. The question is how. Governments have different tools at their disposal to encourage—or discourage—investment. Tax policy can, for example, either provide an incentive or a disincentive for firms to invest in Canada. Businesses want low taxes of course, but they also need to have the infrastructure and security that governments provide. Regulatory burden is another tool. Here also, governments must establish appropriate safety, environmental, and employment standards, while not creating an unwelcoming investment climate. The legal system is also important: it is crucial to offer an independent judiciary that respects the rule of law, and that does not discriminate against foreign parties. Competition law is part of this. Having fair "rules of the road" assures investors that they will be able to enter and expand in markets in Canada. Many countries, including Canada, have legislation designed to enable the government to block foreign investments that are not in the public interest. Since 1985, Canada has had a largely permissive foreign direct investment regime. Investments above certain thresholds are permitted only if they are found to be in the public interest. These thresholds are quite high, however. For example, companies from WTO countries make investments up to $1.141 billion before requiring approval. These thresholds are lower for state-owned enterprises. Investments in certain sectors, such as cultural businesses, airlines, and telecommunications, are subject to further restrictions. The Investment Canada Act also provides for national security reviews of investments.

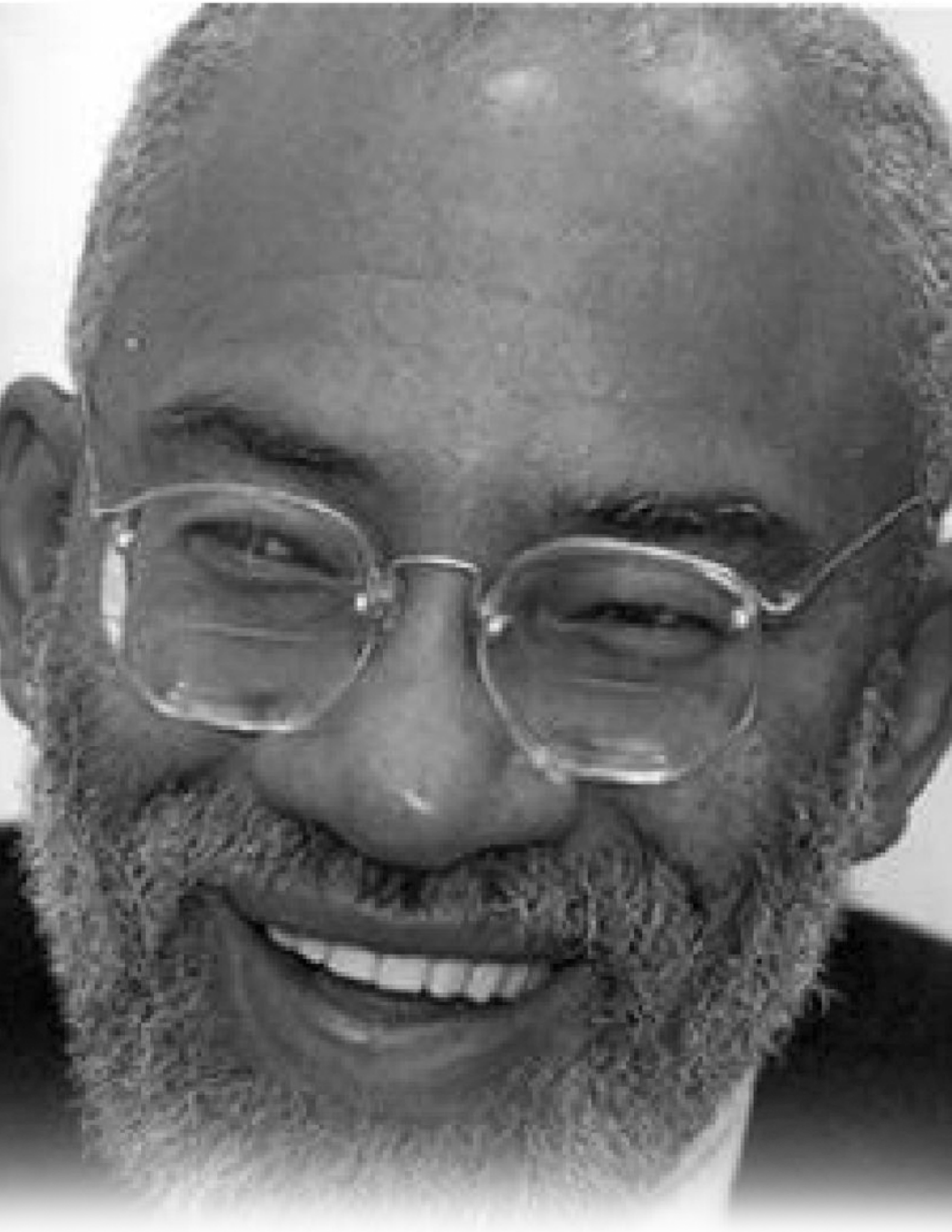
The AAL Magazine: If there are more than two Canadian companies engaged in exports but not relevant to domestic consumption, does the Act cover competitive practices in the export market as well. I would assume the legislative rationale of the Competition Law strictly

speaks of competition within Canada but I have my reservations over its applicability to Canadian companies engaged in exports.

Michael Osborne: The Competition Act is primarily about competition in Canada. In principle, Canada has no business regulating competition in other countries. But what happens when a Canadian firm engages in behaviour that harms competition in another country? The answer is not so clearcut. Foreign competition authorities and courts might well take jurisdiction in those cases. But while Canadian courts readily enforce foreign judgments in civil matters, they are unlikely to enforce decisions of foreign courts or competition authorities under their competition laws. It may be possible to bring a proceeding in Canada on the basis of harm in another country. This is done frequently to combat cross-border frauds. But in those cases, the foreign country would have to rely on the Competition Bureau to bring the case. What is more, Canada's cartel offence provision contains an exception for export cartels. That said, the Competition Bureau collaborates frequently and closely with its counterparts in the US and the EU on cases, particularly merger review.

The AAL Magazine: There have been situations where a company could maintain a market dominance and derive benefit from that to win export orders. A company would say they are the largest producer of product X in Canada and have had no issues whatsoever with that product. Eg. An aircraft manufactured in Canada with no serious safety issues. This situation would enable a Canadian company to secure deals overseas by self-glorifying its successes within the Canadian market. By over regulation of 'dominant market' principle - would it not hamper chances of Canadian companies to secure orders from overseas?

Michael Osborne: In the first place, competition law does not penalize firms for having market power. The fact that a firm has market power is not a basis on which to bring any kind of proceeding. It is only when that firm attempts to increase or retain its market power using conduct that excludes or disciplines rivals, or through predatory behaviours, that competition law intervenes. There is a perennial debate over whether we should encourage the development of "Canadian champions". That is, should we calibrate our competition policy so as to foster the growth of large firms that can compete on a global scale? Because Canada is a relatively small market, this could involve allowing mergers that will reduce competition in Canada, on the basis that the merger will produce a global powerhouse firm that can compete globally. The problem with this approach is that monopolies tend to become inefficient. They stop responding to consumers; they stop innovating and improving their products. When that happens, the firm becomes less, not more, competitive on the global market. In short, the best way to encourage the development of firms that can compete globally is to have an open economy that exposes firms to the harsh winds of competition.



Prof. Roy L Brooks on Judicial Legitimacy

Professor Roy L. Brooks is the Warren Distinguished Professor of Law and twice selected as University Professor. He has been recognized by students three times as the best teacher of the year. A graduate of Yale Law School Class of 1975 where he served as an editor of the Yale Law Journal, Professor Brooks teaches and writes in the areas of civil rights, jurisprudence, international human rights, and critical theory. He is the author of more than 110 articles and over 20 books, including Diversity Judgments: Democratizing Judicial Legitimacy, published by Cambridge University Press, The Racial Glass Ceiling: Subordination in American Law and Culture, published by Yale University Press; Integration or Separation? A Strategy for Racial Equality, published by Harvard University Press; Racial Justice in the Age of Obama, published by Princeton University Press; Atonement and Forgiveness: A New Model for Black Reparations, published by University of California Press, and The Law of Discrimination: Cases and Perspectives (with Gilbert Carrasco and Michael Selmi), published by Lexis/Nexis. Professor Brooks is a member of the Author Guild and the American Law Institute.

The AAL Magazine: Professor Brooks, your book Diversity Judgments: Democratizing Judicial Legitimacy has just been published by the Cambridge University Press. I understand you have also published a number of books on civil rights and human rights law in the past and have been awarded the Gustavus Myers Outstanding Book Award twice and the Brandeis University Library Learned Research Journal Award in recognition of your contribution to scholarship. You have also been awarded the Thorsnes Prize for Excellence in Teaching three times. It is indeed a very rare honor for any author to receive a national book award. Congratulations Professor. Hopefully this book too will receive such an honor as it addresses a very important topic. Tell me why you think diversity matters in a democracy.

Prof. Brooks: That question certainly goes to the heart of my book. In the book, I argue that the US Supreme Court has a legitimacy problem in America's modern democratic society less because of the usual suspects (e.g., the composition of the Court or the politicization of the confirmation process) than because of the Court's deliberative process. That is, the Court's deliberative process in what Justice Holmes called "great cases" (cases that raise socially significant, polycentric issues) moves against the direction in which the society it is charge with serving is moving—greater diversity and inclusion. Big law, big business, universities and colleges, sports and entertainment, and governments at all levels are becoming more committed to the ideal of diversity and inclusion. The outlier is the Supreme Court of the United States, which sets the standard for all other courts. The Court's deliberative process discounts or ignores the values or experiences of outsiders (people of color, women, and the LGBTQ community) while it tends to embrace the worldview of insiders (straight white men). The book gives detailed examples and shows how the Court can fix the problem—in other words, modernize and democratize its deliberative process—by self-consciously engaging both outsider and insider values and then reconciling

differences on the basis of our shared commitment to diversity and inclusivity. Thus, the relationship between democracy and diversity is crucial to the book's central argument.

Democracy has both a procedural side and a substantive side. Procedurally, democracy refers to free and fair elections in a society. Substantively, democracy refers to a society's internal morality—human dignity, equality, equity. Diversity speaks most directly to the substantive side of democracy. It is concerned with how people with distinctively different group affiliations (racial, ethnic, sexual, gender, and so on) are treated in society. What opportunities do they have, formal or informal, for socioeconomic mobility, cultural expression, and judicial validation? In a word, diversity draws attention to the myriad ways in which democracy is manifested in the lived experiences of its people The concern is for racial democracy, gender democracy, and so on. The Supreme Court buys none of this and, in fact, seems hostile to the very idea of diversity and inclusion as when its reasoning leads to judgments that make it difficult for women to sue former husbands for child support, overturns the remedial provision of the Violence Against Women's Act, allows the doctrine of qualified immunity to protect police officers who kill unarmed black men and women, ignores the disparate impact public school financing schemes have on black and brown students, creates artificial distinctions that maintain de facto segregated schools, allows employers to discriminate against black hairstyles, thereby disrespecting the intersectional identity of black women, and politicians to enact voting laws that effectively target black voters (such as laws that accept a hunting license as a valid voter ID but not a social security card). Ignoring the cultural imperative within the black community that teaches innocent black youngsters to run from the police if they can rather than risk being falsely arrested or killed while in police custody, the Supreme Court's rules on the use of deadly force allow police offers to shoot unarmed, nonthreatening fleeing black youngsters in the back. And though nearly half of all admittees to elite American colleges and universities are legacy/VIP students, approximately 75% of whom would not have been admitted through the normal admissions process, a majority of Supreme Court justices would rather outlaw race-based affirmative action, which typically only admits less than 2% of the meager number of non-legacy/VIP minority admittees, than to do anything about the real problem in admissions—legacy/VIP affirmative action. How do any of these outcomes square with a society's commitment to diversity and inclusion?

The AAL Magazine: The Fourteenth Amendment to the Constitution granted citizenship and equal legal rights and due process of law to African Americans. Has the ideal of racial equality been realized in conformity with the original scope of the Amendment?

Prof. Brooks: Proceeding from the original meaning of any constitutional provision (called "the Dead Constitution" or "originalism") is but one way in which a court can read the provision. The other basic way is to update the provision to meet

the demands of a changing society (called "the Living Constitution"). Either way, judicial interpretation of the Constitution is more subjective, or norm-based, than mathematical. To borrow from Justice Holmes, "the life of the law has not been logic but experience." The public understanding of the Fourteenth Amendment when it was ratified in 1868 does not enable the US to realize the great potential of equal protection and due process of law. The Amendment's framers, the Thirty-ninth Congress, read the Equality Protection Clause in harmony with the then-common meaning of racial equality; namely, "separate but equal." Indeed, Congress made no attempt to desegregate the public schools of Washington, DC or anywhere else. These schools, as well as the public schools in the home districts of virtually every member of Congress who voted for the Fourteenth Amendment, were segregated both before and after the Amendment's passage and ratification. "Separate but equal," not desegregation or integration, was the public understanding of "equality" or "equal protection of the laws" during the years following the Civil War. Otherwise, the Fourteenth Amendment would never have been proposed let alone ratified. Equally significant, Justice Harlan's dissenting opinion in Plessy v. Ferguson (1896), arguing that the Constitution is color blind, would have been the majority opinion in that case if color blind and not "separate but equality" was the public meaning of the Equal Protection Clause. Plessy's decision was only a generation removed from the Fourteenth Amendment's ratification. Furthermore, given all we know about the aftermath of the Civil War, it is ludicrous to suppose that the lawmakers of that era intended, hoped, or expected that racial mixing would be within the public meaning ascribed to the Equal Protection Clause. The significance of this observation should escape no one: the original meaning of the Equal Protection Clause cannot sustain the Supreme Court's judgment in the most important civil rights case in history—Brown v. Board of Education (1954), which sounded the death knell for "separate but equal" not just in public education but in all segments of public life. In the context of my book, one would have to conclude that an originalist approach to the Equal Protection Clause is wholly at odds with our current society's commitment to diversity and inclusion. A different approach is needed if we are to realize the full promise of the Fourteenth Amendment.

The AAL Magazine: Professor, you write in your book that you want to challenge the 'orthodoxy of judicial decision making' and that you argue that the Supreme Court has not walked in lock step with diversity and inclusion as amply manifested in the American society. Please expatiate. What is the orthodoxy you visualize in the book?

Prof. Brooks: Every law student from day one of law is taught this orthodoxy. I've taught it to my students for decades. The received tradition posits that legitimate judicial decision-making consists of the interplay between two constituent processes—the logical method and the policy method. The logical method is rule-oriented while the policy method, as its name implies, is policy-oriented. Taken together, these judicial methods (what I

collectively term "traditional process") are deemed to mark the permissible range of judicial decision-making in our society. But here is the rub: the logical method and the policy method are over 250 years old. Our society today neither looks nor thinks the way it did even fifty years ago, let alone at the time of the Revolutionary War. There was no articulated commitment to cultural diversity, let alone equality, when traditional process was conceived during the time of Blackstone and subsequently refined by the likes of John Marshall, Roger Taney, Joseph Story, Oliver Wendell Holmes, Roscoe Pound, Henry Hart, Albert Sacks, and H. L. A. Hart. We are much more committed to diversity and inclusion today than at any other time in our Anglo-American history. That ought to count for something in judicial decision making. A judicial process constructed with the sensibilities of a bygone era when only straight white men (called "insiders") were deemed to matter operates in an unfair and undemocratic manner today. People of color, women, and the LGBTQ community (called "outsiders") did not have a seat at the table 250 years ago and they do not call the shots today. No amount of tweaking around the edges of the judiciary, including setting term limits or changing the composition of the Supreme Court, can overcome deep-rooted defects built into the process ab initio. In the book, I quote remarks made by former Chief Justice Cheri Beasley of the North Carolina Supreme Court, the first African-American woman to serve in that position: "Justice is not an achievement, it is a process." In contrast to judicial orthodoxy, the book constructs a new, democratic concept of judicial legitimacy and an accompanying process of judicial decision making, one that is more in tune with the exigencies of today's society than with eighteenth-century America. Judicial legitimacy, I argue, inheres in judicial decision-making that faithfully engages traditional process (insider-oriented) and critical process (outsider-oriented) and uses the diversity-and-inclusion norm to reconcile differences within and between these processes. Judicial outcomes depend not on the decision-makers' private values but on extant community expectations of diversity and inclusion. We should, therefore, support the final decision in the case whether it goes for or against insiders or outsiders.

The AAL Magazine: When you say there is diversity in the American society, do you mean that there are more news channels, print or electronic media, and that anyone can express their views and thoughts. In what form is diversity manifested in the society? It cannot possible be confined to freedom of speech—though it is the first principle from which it can traverse the other areas of human activities. I personally believe the American media plays an important role in giving space to diverse viewpoints—in non-judicial sense—but should the diversity be evinced in other areas of life?

Prof. Brooks: Diversity and inclusion have broad appeal in American society. Opinion polls show that most Americans today, especially among college graduates, self-identify as a people committed to socioeconomic and cultural diversity and inclusion. Middle-class whites, in

particular, are far less inclined today to see the United States as a "white man's country" than they were during the days of Jim Crow and before that time. Major American businesses, from General Motors to Amazon, have made it clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, experiences, ideas, and viewpoints. High-ranking officers and civilian leaders of the United States military have asserted that a highly qualified, racially diverse officer corps is essential to the military's ability to fulfill its principal mission of providing national security. Underscoring the acceptance and importance of the diversity-and-inclusion norm in today's society, Wal-Mart, the largest private employer in the United States, has instructed its top 100 law firms that at least one person of color and one woman must be among the top five relationship attorneys that handle its business. Wal-Mart is not alone. One-hundred-fifty large corporations (including Procter & Gamble, New York Life, PricewaterhouseCoopers) created the "CEO Action for Diversity and Inclusion" initiative in 2017 in an effort to foster more open discussion about race and gender in the workplace. Subsequently, the general counsels and chief legal officers at more than 170 companies have signed an open letter declaring that they expect law firms representing their companies to reflect the diversity of the legal community and the companies and the customers they serve. California requires public companies to have at least one female member of their Boards of Directors. Boards with five members must have two women directors, and six member boards must have three or face fines. American institutions are making adjustments for diversity and inclusion. Again, the Supreme Court is the outlier.

The AAL Magazine: The direction in which the society is marching is a very broad classification of a serious social phenomenon. You may have identified it through your long association with socio-legal research. Can you please throw some light on this phenomenon as you have referred to it in your book?

Prof. Brooks: For most of its history, America saw herself as a "white man's country." Even Justice Harlan held that vision of America when he issued his "great dissent" in Plessy v. Ferguson in 1896 wherein he argued for a color-blind Constitution. He expressed the belief that white Americans will remain the dominant race in this country even under a color-blind Constitution. D. W. Griffith's hugely popular 1915 film, The Birth of a Nation (originally titled The Clansman), which was shown in the White House, affirmed this view of America. In that film, the Klu Klux Klan was portrayed as the defender of not just a white South but a white America. William F. Buckley, the famous author, pundit, and architect of modern conservatism, expressed the dominant American view in his famous (now infamous) 1957 National Review editorial titled "Why the South Must Prevail." There he argued against extending voting rights to Southern blacks. But, as I mentioned earlier, most educated white Americans today self-identify as a people committed to diversity and inclusion. This cultural shift certainly informs what is arguably the Supreme

Court's most important decision on the matter of diversity and inclusion—Grutter v. Bollinger (2003). A majority of the justices in Grutter ruled that student body diversity constitutes a compelling governmental interest for purposes of satisfying the dictates of the Fourteenth Amendment's Equal Protection Clause. In so ruling not only in Grutter but also in its companion case, Gratz v. Bollinger (2003), the Court gave its imprimatur to the diversity-and-inclusion norm. The Court saw legitimacy in the norm's potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts. The next step in the Supreme Court's own evolution is to catch up with the rest of society. It can do this by incorporating the diversity-and-inclusion norm in its deliberative process as outlined in my book.

The AAL Magazine: As regards judicial appointments, what are your thoughts on the politicization of the Supreme Court appointments? Do you think the current system should be retired in favor of an independent body that appoints Supreme Court justices? Should there be a holistic approach to all judicial appointments at every level?

Prof. Brooks: Defining the legitimacy problem as a problem involving the confirmation process, composition of the Court or term limits does not dig deep enough to get at the root of the problem. Focusing on these matters is like rearranging the chairs on the deck of the Titanic. It doesn't matter who is sitting in the chairs or how they got there; they are all going down with the ship. All the justices follow traditional process—conservatives the logical method, liberals the policy method—as that is what they were taught in law school. The direction in which the ship is sailing must change if it is to be saved, which is to say the Supreme Court's deliberative process must change.

The AAL Magazine: What are the contours of judicial legitimacy in terms of methods adopted by the Supreme Court in making decisions based on law versus equity, rules versus policy, formalism versus instrumentalism and the logical method versus the policy method?

Prof. Brooks: When I think of law, I think of extant rules of conduct. When I think of equity, I think of community norms or expectations that speak to the spirit of law. Both are ex ante, but equity is less constrained than law. The quality of equity, like mercy, is not strained, to borrow from Shakespeare's Portia. Aristotle believed that both law and equity are necessary components of any legal system committed to achieving justice. Law informs the logical method and equity, with its consequentialism, informs the policy method. Traditionally, law students are taught that the logical method and policy method establish the boundary of judicial legitimacy. Indeed, the Supreme Court's decision-making proceeds within these boundaries. Broadly speaking, justices on the right embrace the logical method and justices on the left hold to the policy method. I argue that the logical method and the policy method (collectively "traditional process") are necessary but not sufficient for establishing the boundaries of judicial legitimacy in a diverse, democratic country like the United States. Outsider sensibilities

and the diversity-and-inclusion norm are also needed. In the book, I transform outsider voices from a theory of legal criticism which we know as "critical theory" into a theory of judicial decision making, something that judges can actually use in deciding cases. I call this new judicial theory "critical process" in contradistinction to "traditional process." So, I believe the traditional notion of judicial legitimacy must be updated to reflect our modern society. Specifically, judicial legitimacy must include not only the logical method and the policy method (traditional process) but also outsider values and experiences (critical process). Differences within and between these processes should be reconciled on the basis of society's commitment to diversity and inclusion. This process captures a crucial element of judicial legitimacy—ex ante decision-making. The justices, in other words, elaborate their reasoning from existing arrangements—insider and outsider.

The AAL Magazine: Professor, if the diversity-and-inclusion norm is a variable factor, then the judiciary cannot stick to precedence. It will have to, instead, contrive a method that defers to current social, economic, and political realities. This is a very broad sweep. I feel the Constitution must be changed to suite the necessities of an evolving society. Our Magazine has argued in favor of such a position. Do you think a fresh approach must be taken or that the efficacy of the Constitution must be studied?

Prof. Brooks: Modernizing the Constitution, such as giving nonbinary individuals explicit constitutional protection, would certainly go a long way in modernizing our law. But a new Constitution would still have to be interpreted. Hence, we are back to the matter of process. In fact, everything that I believe needs to be done to resolve the legitimacy problem can be done under the existing Constitution if the Court changes the way it decides socially significant cases. But your question also raises a fundamental socio-legal issue: the rule of law.

Does democratizing judicial decision making along the lines crafted in my book mean that the Court must jettison the rule of law? Roscoe Pound once said that "law must be stable, but it must not stand still." Once a judicial ruling has been made, we must all abide by it. That's the rule of law. But that does not mean that law cannot or should not change; that's Pound's point. Indeed, the conservative wing of the Supreme Court is on the verge of changing longstanding law in several socially significant cases like abortion and affirmative action and, for some members of that faction, even the venerable right to counsel. My book simply argues that more voices—specifically outsider voices as well as voices advocating for diversity and inclusion—need to be not just heard but factored in when the Supreme Court deliberates these types of cases. One of my students reminds me of the song in the uber successful Broadway musical, "Hamilton," which tells the story of one of the Founders, Alexander Hamilton. The song contains this refrain: "I want to be in the room where it happens, the room where it happens, the room where it happens." Like Hamilton, outsiders also want to be in the room where

decisions affecting their lives will be made. They want to have a say in shaping the nation through laws and processes.

The AAL Magazine: You refer to an aspect of legal theory expounded by Justice Scalia. 'Scalian textualism,' which you defined as judicial fidelity to authoritative text; in other words, the judge's reasoning consists of reading the governing text very closely to find its public meaning at the time of enactment, followed by a deduction or a logical application to the facts of the case. Does Scalian textualism or any other aspect of traditional process take into account American society's commitment to diversity and inclusion?

Prof. Brooks: The answer is no, as such policy consideration would constitute illegitimate judicial decision making in Scalia's jurisprudence. In fact, no single theory within traditional process or within critical process can vindicate the diversity-and-inclusion norm in American society. Both processes are needed to achieve that social end. I should draw attention to a very sinister feature of Scalian textualism. In its resolute support of the Dead Constitution, Scalian constitutional textualism ignores or discounts outsider values or experiences with impunity. In fact, it insults outsiders by asking them to accept an interpretative process that restricts constitutional meaning to a timeframe in which blacks were enslaved, women were second-class citizens, and the LGBTQ community was not even allowed to exist. It is the only judicial theory in which the dead are allowed to bury the living.

The AAL Magazine: What exactly is the moral reading of the Constitution? Justice Scalia said that the 'moral' precepts of future societies may not be as moral as those that underpin the Constitution as originally conceived. What's your view?

Prof. Brooks: Justice Scalia criticized the Living Constitution, in which the meaning of the Constitution changes over time in lockstep with changes in society, on several grounds, one of which is the anthropological assertion that societies do not necessarily get better (more moral) over time. The example often given is Germany in the 1930s, which is generally regarded as a highly evolved society. Fearing social devolution, Scalia, preferred the Dead Constitution—constitutional text frozen in time, 1791—over the Living Constitution. Justice Scalia would not be opposed to amending the Constitution through the amendment process ordained in the Constitution. He was only opposed to amendment by judicial fiat. Yet, given the traditionalist that he was, Justice Scalia would probably not have seen any need to amend the Constitution to expand rights. I find Justice Holmes to be far more instructive in helping one to think through these complex issues. He wrote on numerous occasions, "the life of the law has not been logic but experience." In response to that aphorism, I argue in the book that the law must be responsive to the experiences or values of all Americans, not just those of straight white men. Diversity and inclusion demand nothing less than that.

The Anglo-American
LAWYER
MAGAZINE

SPECIAL MESSAGE TO THE PRESIDENT

OF THE UNITED STATES OF AMERICA JOE BIDEN

Dear Mr. President,

The invention of hypersonic missiles by the perceived enemies of the United States would be a huge national security concern. The speed with which they are delivered will wreak havoc resulting in breaking the constitutional order of the United States which it had cherished for two centuries. The attack on the U.S. satellite communication facilities in space could be the first strike option against the U.S. It could cut off the President of the U.S from the Nation, from the Military Commanders and the civil government as a result you will not be able to communicate with U.S allies in Europe/ NATO, Israel, Japan, India, Australia, New Zealand, and elsewhere. Your position as Commander-In-Chief of the U.S forces would be meaningless if you are unable to communicate with the Nation. The key allies of the U.S., would lose confidence in your ability to wage a coordinated battle against the perceived enemies. The authoritarian regimes in the world would feel triumphant and forge new strategic alliances.

We, *The Anglo-American Lawyer* Magazine, call upon you to immediately appoint a Presidential Commission to inquire into the efficacy of the U.S constitution and whether it should be suitably revised or amended to deal with the new threats. This will ensure that the security of the strategic allies of the U.S too is guaranteed in case such an eventuality takes place.

God Bless America

OVER TO YOU MR. PRESIDENT

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